SERVED: January 31, 2008

NTSB Order No. EA-5359

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of January, 2008

ROBERT A. STURGELL, Acting Administrator, Federal Aviation Administration, Complainant, v. DONALD C. ROUNDS, Respondent.	)	Docket SE-17829

OPINION AND ORDER

Respondent appeals the written initial decision of Administrative Law Judge William R. Mullins, issued July 9, 2007,[1] following a March 6, 2007 evidentiary hearing. By that decision, the law judge affirmed an order of the Administrator suspending respondent's airline transport pilot (ATP)

[1] A copy of the decisional order is attached.

certificate for 120 days, based on violations of 14 C.F.R. §§ 91.13(a)[2] and 91.111(a).[3] We deny respondent's appeal.

The Administrator's September 21, 2006 order functions as the complaint, and alleges that, on July 30, 2005, respondent was the pilot-in-command of a T-33 aircraft, on a flight near Oshkosh, Wisconsin. The Administrator also alleges that, during this flight, respondent approached a Mitsubishi MU-2 aircraft, overtook it from underneath, and pulled up very close in front of that aircraft, thereby creating a collision hazard, in violation of § 91.111(a). The Administrator alleges that such operation was careless and endangered the lives and property of others, in violation of § 91.13(a).

At the hearing, the Administrator presented the testimony of the pilot of the MU-2 (Dr. Marius Maxwell), and the FAA aviation safety inspector who investigated the incident (Daniel McKinney). Dr. Maxwell testified that he received his private pilot certificate in 1979 or 1980, and then got his commercial pilot certificate and instrument rating in the late 1980's or early 1990's. Since that time, he added a private rotorcraft and single-engine sea rating, and also received training in air

[2] Section 91.13(a) prohibits operation of an aircraft in a careless or reckless manner so as to endanger the life or property of another person.

[3] Section 91.111(a) prohibits operation of an aircraft so close to another aircraft as to create a collision hazard.

combat maneuvers, after he became interested in warbirds and bought a P-51 Mustang, a MiG-17, and the MU-2. He also owns an aerobatic aircraft, the Extra 300L. Dr. Maxwell testified that, during combat maneuver instruction, he had the opportunity to maneuver in close proximity to other aircraft, within about 500 or 600 feet. It was in training for flying the P-51 that he met and received instruction from respondent.

Dr. Maxwell testified that, on July 30, 2005, respondent pulled up in front of him he was flying his MU-2 on approach to the Oshkosh Airport. He said that respondent's bright red T-33 pulled up very sharply in front of his MU-2 approximately 100 to 200 feet away, that it was a near-vertical, very fast pull up, that the aircraft was not accelerating away from him, that they were closing very fast, and that he banked abruptly to the left and "slammed through" the jet wake. He testified that he heard laughter on the radio. Dr. Tim Gill, a passenger in the MU-2, in a statement regarding the incident, stated that a red jet aircraft appeared in front of them, about 200 feet away.

Respondent presented the testimony of Phillip Boushard, who was his passenger in the T-33. Mr. Boushard testified that he simply did not see another aircraft. Respondent also presented the testimony of Francis DeJoseph, a retired FAA inspector, who testified that he reviewed the statements of Dr. Maxwell and his passenger, Dr. Gill, and that he did not believe them because of

the differences in their accounts of the incident. Finally, respondent presented the testimony of Mr. Kay Eckhart, a classic jet enthusiast and T-33 pilot. Mr. Eckhart testified that, in his opinion, the incident could not have happened the way that Dr. Maxwell described it. Respondent also testified at the hearing.

The law judge affirmed the Administrator's order based on a determination of credibility. The law judge summarized witness testimony and reviewed the evidence in the record in determining that Dr. Maxwell was more credible, "given the circumstances of this case, and as supported by his passenger, Dr. Tim Gill," than respondent. Written Initial Decision at 10. In weighing the evidence and assessing the credibility of each witness, the law judge concluded that the Administrator had shown that respondent violated §§ 91.13(a) and 91.111(a).

One of respondent's two arguments on appeal is that the law judge's credibility findings were erroneous and contrary to the weight of the evidence. Respondent's other argument is that he was denied due process. The Administrator opposes respondent's arguments and urges us to affirm the law judge's decision.

We have held that our law judges are in the best position to evaluate witnesses' credibility.[4] We have also held that

[4] Administrator v. Taylor, NTSB Order No. EA-4509 (1996) (the law judge sees and hears the witnesses, and he is in the best

credibility determinations are "within the exclusive province of the law judge," unless the law judge has made the determinations "in an arbitrary or capricious manner."[5] In this regard, the Board is free to reject testimony that a law judge has accepted when the Board finds that the testimony is inherently incredible or inconsistent with the overwhelming weight of the evidence.[6] Therefore, where parties challenge a law judge's credibility determinations, the Board will not reverse the determinations unless they are arbitrary, capricious, or clearly erroneous.[7]

Respondent first argues that there is no credible evidence to support Dr. Maxwell's version of the events. Respondent's Appeal Br. at 18-23. Respondent focuses, unnecessarily in our view, on the term "near midair collision," and appears to use the terms "collision hazard" and "near midair collision" interchangeably. The allegation is not that respondent created a "near midair collision," but that he created a collision hazard. The term "collision hazard" is not defined in the

(..continued)
position to evaluate their credibility).

[5] Administrator v. Kocsis, 4 NTSB 461, 465 n.23 (1982); see also Administrator v. Smith, 5 NTSB 1560, 1563 (1986); Administrator v. Sanders, 4 NTSB 1062 (1983).

[6] Administrator v. Blossom, 7 NTSB 76, 77 (1990) (citing Administrator v. Powell, 4 NTSB 642, 645 (1983); Administrator v. Klayer, 1 NTSB 982, 983 (1970); and Administrator v. Chirino, 5 NTSB 1661, 1663 (1987)).

[7] Smith, supra at 1563.

regulations, nor is it defined in the FAA's Aeronautical Information Manual (AIM). We note that the AIM is not regulatory in nature, but rather "provide[s] the aviation community with basic flight information and ATC procedures...." See AIM, Preface. The AIM does define the term "near midair collision," however:

> A near midair collision is defined as an incident associated with the operation of an aircraft in which a possibility of collision occurs as a result of proximity of less than 500 feet to another aircraft, or a report is received from a pilot or a flight crew member stating that a collision hazard existed between two or more aircraft.

AIM, paragraph 7-6-3.b., 2005 version. It is that definition upon which respondent unnecessarily relies in pressing his argument that he did not violate § 91.111, *Operating near another aircraft*, the pertinent subsection of which prohibits operation of an aircraft so close to another aircraft as to create a collision hazard. The key issue before us is whether respondent brought his T-33 so close to Dr. Maxwell's MU-2 as to create a collision hazard. For the purpose of argument, it does not matter whether respondent caused or almost caused a near midair collision; it does not matter whether respondent came within 50 feet or 5,000 feet of the MU-2. What matters is whether respondent operated his aircraft so close to another aircraft as to create a collision hazard. Depending on the circumstances, the distance could have been more or less than

the 500 feet upon which respondent wants to rely. As we have previously held:

> proximity is not the only relevant consideration in determining whether a collision hazard exists. The fact that an experienced pilot feels compelled to take evasive action to avoid a collision is itself acceptable evidence of a potential collision hazard.[8]

With regard to the law judge's credibility determinations, respondent has not shown that the determinations were arbitrary, capricious, or contrary to the weight of the evidence, and we find that they were not.

As to respondent's second argument, he contends that he was denied due process of law in that the FAA's investigation of the alleged incident was cursory and did not follow the FAA's internal guidance for such investigations, and that the law judge "summarily dismissed" respondent's due process argument before the close of the hearing. First, we reject respondent's complaint regarding the FAA's investigation. "We do not judge the quality or extent of the Administrator's investigation. The Administrator has the burden of proof and a poor investigation

[8] Administrator v. Reinhold, NTSB Order No. EA-4185 at 9 (1994), citing Administrator v. Tamargo, NTSB Order No. EA-4087 (1994) (50-foot separation); Administrator v. Willbanks, 3 NTSB 3632 (1981) (1000-foot lateral and 500-foot vertical separation); and Administrator v. Werner, 3 NTSB 2082 (1979) (fact that aircraft may not have come closer than 3000 feet is not grounds for reversing a charge of careless or reckless operation when a highly experienced pilot felt respondent was close enough to prompt him to take evasive action so as not to have a midair collision).

can result in dismissal of the complaint...." Administrator v. Moore, NTSB Order No. EA-4992 at 8 (2002).

Respondent cites several cases for the proposition that a government agency is bound to follow its own rules.[9] Respondent misunderstands the holding in these cases and their lack of application to the instant case. The cases that respondent relies upon are cases interpreting agency rules which confer a benefit upon a respondent. The agency rules that respondent attacks here are not rules that confer a benefit upon him, but are rules that guide FAA employees in the investigation of incidents that may impact air safety.[10] Randall deals with the question regarding what evidence the FAA can use in pursuing enforcement action. Mr. Randall objected to the use of certain evidence at his hearing. The Board's ruling was that it would not allow the Administrator to rely on that evidence in its

[9] See Respondent's Appeal Brief at 6, citing Administrator v. Randall, 3 NTSB 3624 (1981); Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363, 388 (1957); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 267 (1954).

[10] See Barrie v. Federal Aviation Administration, 16 Fed. Appx. 930, 934 (10th Cir. 2001) (unpublished) ("the FAA orders do not provide aircraft operators with any rights; the orders exist as guides to inspectors. ... The purpose of the order is to aid inspectors in carrying out FAA policies. ... Unlike other cases in which Accardi applies, these [] orders do not purport to provide aircraft operators with any procedural or substantive rights. ... Thus, even if the inspectors violated the ... policies in question, the violations do not bear on the propriety of Barrie's suspended pilot certificate").

enforcement action, when the Administrator's own written policy stated that, in the circumstances of that case, that type of evidence would not be used to support an enforcement action. The cases that respondent cites have no application to the present case.

Finally, respondent argues that he was denied due process because the law judge "formed an unalterable view of the due process issue prior to the closing arguments," in violation of the Board's Rules of Practice.[11] Respondent complains about the law judge stating, as to respondent's due process arguments:

> The facts are, and it's clear in the evidence that the Administrator did not follow their order. And the reason they didn't follow their order is the way this thing arrived on their doorstep. And you can raise that issue in your brief in general to preserve it at the Board level, but I'm not going to deal with it anymore.

Tr. at 189. What respondent does not provide, however, is the context of those comments. Immediately preceding the quoted sentences is:

---

[11] Respondent cited 49 C.F.R. § 821.39, which provides that:

> At the hearing, the law judge shall give the parties adequate opportunity for the presentation of arguments in support of, or in opposition to, motions, objections and proposed rulings. Prior to the issuance of the initial decision, the parties shall be afforded a reasonable opportunity to submit for consideration proposed findings and conclusions, and supporting reasons therefor.

> I want you to go wherever you want to go but I want findings of fact in there but you don't need to waste your time on specific findings of fact.

Furthermore, the context is that the law judge had just asked for written briefs for closing argument. Tr. at 186. In clarification and in asking specifically for proposed findings of fact, the law judge stated:

> And I will address those, except those issues that have been resolved and that is the motion in limine, the issues raised in the motion for directed verdict, and I'm talking about the FAA and what has been suggested as their failure to follow procedure. You can raise those issues. I probably won't address those in the findings of fact because I've already dealt with that.

Tr. at 186-87. Respondent's counsel subsequently sought clarification regarding the law judge's directions, asking, "You do or do not want argument about the FAA investigation in your brief?" Tr. at 188. The law judge replied:

> I just don't think it needs to be in your findings of fact. I think I've dealt with that because that way you can have it preserved in the next level [of appeal].
>
> Well, I'm not saying not to raise the constitutional issues. That's not in the findings of fact.

Id. It is clear from this exchange that the law judge certainly did not preclude respondent from arguing about any due process issues. Respondent did, in fact, present extensive argument on the due process issue in his post-hearing closing argument brief, devoting about 7 pages of an 18-page brief to it, and

including 4 of 13 proposed findings of fact regarding the issue. Respondent cites Administrator v. Simonye, 4 NTSB 159 (1982), in support of his argument. That case is readily distinguished. The Board remanded Simonye to the law judge based on the Administrator's appeal, because the law judge actually indicated before closing argument that she was dismissing the alcoholic beverages charges, because she was "not satisfied with the proof of those charges...." Id. at 160. The Board noted that, while it would not normally be receptive to an argument suggesting that the law judge may have overlooked certain evidence because the law judge did not specifically mention it,

> In this instance the Administrator's argument must be evaluated in light of the fact that he was not given the opportunity to argue *any* of the evidence bearing on the [alcoholic beverages] charges.

Id. at 161 (emphasis in original). The Board's remand for further proceedings and argument was limited to the alcoholic beverages charges. Id. Respondent was not so aggrieved here.

Now we must discuss an issue not raised by respondent. In commenting on his credibility determinations, the law judge made the statement that respondent was "entitled to less credibility, particularly in light of his history involving a similar incident." Written Initial Decision at 10. He was referring to an incident years before the current allegations, in which an aircraft piloted by respondent approached a law enforcement

helicopter that an acquaintance was piloting and, admittedly, overtook it from underneath, and pulled up very close in front of the helicopter, when the helicopter was only 300 feet above the ground. There was no enforcement action for that incident; apparently it was not reported to the FAA. At any rate, such evidence would not likely be allowed under the Federal Rules of Evidence, which generally forbid the admission of evidence of other crimes, wrongs, or acts to show that a person acted in conformity therewith.[12] We believe that it was error for the law judge to consider this in making his credibility determination. However, the law judge had already credited the testimony of Dr. Maxwell ("[t]he testimony of Dr. Maxwell is more credible given the circumstances of this case") before he made the statement regarding respondent's credibility, and we note his use of the word "particularly" in qualifying his assessment.

Upon consideration of the briefs of the parties and the entire record, the Board finds that safety in air commerce or air transportation and the public interest require affirmation of the law judge's decision.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The law judge's decision is affirmed; and

[12] See Federal Rule of Evidence 404(b); see also, Administrator v. Arizona Aviation Avionics, NTSB Order No. EA-4861 at n.9 (2000) (discussing Federal Rule of Evidence 404(a)).

3. The 120-day suspension of respondent's ATP certificate shall begin 30 days after the service date indicated on this opinion and order.[13]

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

[13] For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).

SERVED JULY 9, 2007

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

MARION C. BLAKEY, Administrator Federal Aviation Administration, Complainant,	*	
v.	*	Docket No. SE-17829 JUDGE MULLINS
DONALD C. ROUNDS, Respondent	*	

SERVICE BY: FAX & REGULAR MAIL
CHRIS G. ZURALES, ESQ.
FAA / OFFICE OF THE REGIONAL COUNSEL (AGK-7K)
2300 E. DEVON
DES PLAINES, IL 60018

SERVICE BY: FAX & OVERNIGHT DELIVERY
ALAN ARMSTRONG
ATTORNEY AT LAW
BUILDING 5, 2900 CHAMBLEE-TUCKER RD.
ATLANTA, GA 30341

WRITTEN INITIAL DECISION

On March 6, 2007, the National Transportation Safety Board heard Respondent's Appeal from an Order of Suspension of Respondent's Airline Transport Pilot Certificate, held under the provisions of Section 44.709 of the Federal Aviation Act of 1958, as amended. Through her Complaint, the Administrator Complainant seeks to suspend Respondent's Airline Transport Pilot Certificate for a period of one hundred-twenty (120) days on the grounds that Respondent, while acting as Pilot In Command of a T-33 aircraft on July 30, 2005, allegedly "overtook from underneath... and pulled up very close in front of" an MU-2 aircraft in flight. The Administrator alleges that Respondent's

operation of his aircraft in such a manner created a collision hazard in violation of §91.111(a) of the Federal Aviation Regulations (14 C.F.R. 91.111(a)), and that Respondent operated his aircraft in a careless manner that endangered the lives and property of others in violation of §91.13(a) of the Federal Aviation Regulations (14 C.F.R. 91.13(a)). For the reasons stated below, the Administrator's Order of Suspension is sustained.

PROCEDURAL HISTORY

On September 21, 2006, Complainant issued an Order of Suspension of Respondent's Airline Transport Pilot Certificate. On September 22, 2006, Respondent filed a Notice of Appeal of Complainant's Order of Suspension. On September 29, 2006, Respondent filed his Answer, in which he denied Complainant's allegations that Respondent operated his aircraft in a careless manner and created a collision hazard in violation of the FARs. On March 5, 2007, Respondent filed a Motion to Dismiss And/Or Directed Verdict Based upon Spoliation of Evidence and Failure to Follow FAA Procedures. A Hearing was conducted on March 6, 2007, at which the undersigned Judge requested briefs addressing the Parties' closing

EVIDENCE PRESENTED AT THE HEARING

In her case-in-chief, the Administrator first presented the testimony of Dr. Marius Maxwell. On July 30, 2005, Dr. Maxwell was the Pilot In Command of the MU-2 aircraft involved in the incident at issue. Dr. Maxwell first testified about the strained history of his relationship with Respondent. (Tr. 21 – 25). Dr. Maxwell then testified regarding the incident at issue. Dr. Maxwell stated that on July 30, 2005, he was flying his MU-2 over Fond du Lac, Wisconsin on approach to the Oshkosh airport with a co-pilot, Dr. Tim Gill. (Tr. 28). Dr. Maxwell stated that very shortly after reporting his position over the common frequency to Fond du Lac ATC, he heard a voice on the radio say "Marius, is that you?" (Tr. 28). Dr. Maxwell stated that he recognized the Respondent's voice, responded in the affirmative, and that a few moments later he became "immediately aware of a bright red T-33 pulling very sharply up in front of [his MU-2]" approximately 100 – 200 feet away. (Tr. 29). Dr. Maxwell stated that he reflexively banked his MU-2 to the left and encountered sharp jet wake approximately two – four seconds later, and

then heard laughter on the common frequency. (Tr. 30). Dr. Maxwell testified that he recovered from this maneuver and continued on to a normal landing at Oshkosh. (Tr. 31). Dr. Maxwell stated that several days after the incident, he made contact with Connie Bowlin, a director with the EAA, in an attempt to "report" the incident. Dr. Maxwell stated that Mrs. Bowlin brought the incident to a subsequent meeting of the EAA Board of Directors approximately one month after the July 30, 2005 incident at Oshkosh, and that sometime in October of 2005 Mrs. Bowlin informed Dr. Maxwell that the EAA Board suggested he report the incident to the FAA. (Tr. 36-37). Dr. Maxwell testified that he reported the incident to his local FSDO in Rapid City, ND in October 2005.

On cross-examination, Respondent's counsel stressed the issue of Dr. Maxwell's delay of more than two months in reporting the incident to the FAA. The undersigned, convinced that Dr. Maxwell reasonably believed reporting the incident to the EAA was an appropriate course of action before being advised to report the incident to the FAA, is not concerned with the passage of time between the incident and the filing of a report with the FAA. Dr. Maxwell was not under any legal duty to report the incident at all, thus the delay is not an issue for the court's consideration and is unrelated to the FAA's decision to institute this certificate action.

The Administrator then presented the testimony of Daniel L. McKinney, an aviation safety inspector with FAA's Rapid City FSDO. Mr. McKinney testified that he received the first report of the incident from Dr. Maxwell in October 2005, and after conferring with the Milwaukee FAA office, further investigated the incident. (Tr. 87). On cross-examination, Mr. McKinney admitted that various radar, communication, and weather data did not accompany the FAA incident report forms.

Counsel for Respondent first presented the testimony of Respondent Donald Rounds. Mr. Rounds testified that, on July 30, 2005 while flying his red T-33 in the vicinity of Oshkosh, Wisconsin, he heard Dr. Maxwell announce his position on arrival over Fond du Lac. Mr. Rounds stated he called out over the common frequency "Is that you, Marius?" and that Dr. Maxwell responded by stating, "Yes, who's that?" (Tr. 140). Mr. Rounds testified that he was flying in an "opposite pattern" and that when he spotted

Dr. Maxwell's aircraft, there was a one thousand foot separation between their aircraft. (Tr. 140).

Respondent then presented the testimony of Phillip Boushard, the backseat passenger on Respondent's aircraft during the incident at issue. Mr. Boushard testified that at not time during his flight with Respondent did he witness anything "alarming" such as a near collision with another aircraft and did not see the other aircraft. (Tr. 160).

Respondent then presented the testimony of Michael DeJoseph, a former FAA investigator. Mr. DeJoseph testified that he had reviewed the factual statements given by Dr. Maxwell and his passenger Dr. Gill, and that he believed there to be discrepancies between the sequence of events as testified to by Dr. Maxwell and those described by Dr. Gill. (Tr. 167-169).

Respondent then presented the testimony of Kay Eckhart, a T-33 pilot. Mr. Eckhart testified that he believed the incident in question "could not have occurred" as described by Dr. Maxwell. (Tr. 176-177).

ARGUMENTS PRESENTED IN THE BRIEFS

In her brief, the Administrator first addressed Respondent's Motion to Dismiss And / Or Directed Verdict Based upon Spoliation of Evidence and Failure to Follow FAA Procedures. The Administrator states that the FAA had no knowledge of the July 30, 2005 incident at issue prior to Dr. Maxwell's report on October 18, 2005, and that sometime before September 15, 2005 the voice tapes and radar data containing data from July 30, 2005 were reused and recycled. The Administrator argues that because there is no evidence that the Administrator knew or should have known there to be relevant evidence on these tapes, the Administrator had no duty to preserve the tapes thus no sanctions should be imposed upon the Administrator. Administrator's Post-Hearing Brief at 3.

The Administrator next addressed Respondent's due process claim. Respondent argued that he was denied due process because the Administrator failed to follow her own internal orders and rules, specifically, that per §7-6-3 of the Airman Information Manual the Milwaukee FSDO should have investigated the incident at issue and not the Rapid City FSDO, and that the Inspector was not in compliance with FAA Order

8020.11B which states the Inspector should complete and distribute the near midair collision report within 90 days of the reported incident. The Administrator argues that Respondent is mistaken in his reliance on Vitarelli v. Seaton, 359 U.S. 535 (1959) (agency's internal order designed to protect the rights of the accused), and Administrator v. Randall, EA-1621 (NTSB 1981) (prohibition on using a particular type of evidence). Administrator's Post-Hearing Brief at 3. The Administrator argues that, though these cases are still good law, they are not applicable in the instant matter. The Administrator argues that the cases are inapplicable here because the Respondent would not have had available any more or different evidence had the Milwaukee FSDO completed the investigation and because there is no prohibition on prosecuting a regulatory violation involving a near midair collision when a near midair collision report was not completed. Accordingly, the Administrator argues that Respondent has not been denied due process where there was no failure on the part of the FAA to abide by its internal orders or directives to the detriment of Respondent. Administrator's Post-Hearing Brief at 4.

The Administrator also addresses Respondent's reliance on the Airman Information Manual's statement regarding when and how a pilot should report a near midair collision. The Administrator argues that this statement in the AIM is not regulatory in nature; that it is merely instructional in nature. Accordingly, the Administrator argues that Dr. Maxwell's failure to report the incident consistent with the language in the AIM does not inhibit the Administrator's ability to prosecute the instant matter. Administrator's Post-Hearing Brief at 4.

In her closing argument, the Administrator first argues simply that if Dr. Maxwell is to be believed with respect to his testimony regarding the incident in question, then the Administrator has "made her case". Administrator's Post-Hearing Brief at 7. The Administrator then calls into the question the reliability of the testimony given by Phillip Bouchard who, though present as a passenger in Respondent's T-33 during the incident in question, is neither a pilot nor mechanic. Administrator's Post-Hearing Brief at 7. The Administrator further argues that the personal history between Respondent and Dr. Maxwell (that Respondent felt he was "stiffed" by Dr. Maxwell in a prior unrelated transaction), particularly in light of a similar incident Respondent admits to (intentionally

"buzzing" a helicopter in flight while acting as pilot in command of a T-34) weighs heavily in favor of believing Dr. Maxwell's testimony over the Respondent's testimony. Administrator's Post-Hearing Brief at 8.

Finally, the Administrator also argues that the testimony of both Mr. DeJoseph and Mr. Eckhart are unreliable and do not "add anything" to the case. Administrator's Post-Hearing Brief at 9.

Respondent argues first that there were "inconsistencies" in the testimony of Dr. Maxwell. Respondent argues, for example, that Dr. Maxwell's written statement to the FAA maintained that his MU-2 was buffeted by turbulence thirty seconds after hearing Respondent's voice over the radio, but that at the hearing Dr. Maxwell testified that it was not until 2-4 seconds after banking to avoid the T-33 when he encountered Respondent's wake turbulence. Respondent's Post-Hearing Brief at 2-3. Respondent also points out that Dr. Gill's statement does not confirm that Respondent even called Dr. Maxwell on the radio at all. Respondent's Post-Hearing Brief at 3.

Respondent then argues that Dr. Maxwell's "failure to timely bring the alleged incident to the attention of the FAA" despite ostensibly being in close proximity to several FAA employees and agents in attendance at Oshkosh, in conjunction with Dr. Maxwell's attempts to pursue the matter first through the EAA, suggest that Dr. Maxwell has misrepresented or fabricated elements of his testimony in an attempt to "satisfy a personal vendetta" against Respondent. Respondent's Post-Hearing Brief at 4. Respondent offers an illustration of the alleged inconsistencies by calculating the distance between Respondent's aircraft and Dr. Maxwell's aircraft based on time and speed figures given by Dr. Maxwell at the hearing. According to Respondent's calculations, the two aircraft involved would have been situated approximately 1,408 feet from each other, not 100 feet from each other as stated by Dr. Maxwell. Respondent's Post-Hearing Brief at 6.

Respondent next argues that Inspector McKinney's report cannot be relied on because it was incomplete, i.e., no radar, weather, or communication data was included in the report. Respondent's Post-Hearing Brief at 10. Respondent argues additionally that Inspector McKinney failed to conduct a complete investigation because he did not contact the Oshkosh control tower and did not know of other relevant facts (e.g., the

existence of a passenger in Respondent's T-33) until after the report was completed. Respondent's Post-Hearing Brief at 10.

Respondent then argues that, per the testimony of Respondent Chris Rounds, Respondent's T-33 never came closer than 1,000 feet from Dr. Maxwell's MU-2. Combined with the testimony of Phillip Bouchard, who testified that he was not aware of any other aircraft in close proximity to Respondent's T-33 during the flight at issue, Respondent suggests that the alleged near midair collision simply did not occur. Respondent does however admit to engaging in affirmative conduct similar to the incident at issue. Respondent's Post-Hearing Brief at 11.

Respondent further argues that the testimony of both Mr. DeJoseph and Mr. Eckhart point out further inconsistencies in Dr. Maxwell's testimony as well as the alleged fallibility of Inspector McKinney's report. Respondent stresses that Mr. DeJoseph, a former FAA safety inspector, "did not believe the narratives of Dr. Maxwell and his passenger, Dr. Gill" because they "could not agree on what happened." Respondent also casts doubt on the Administrator's claims as to the proximity of the aircraft during the incident at issue through Mr. DeJoseph's testimony that "determining the distance of two airplanes in space is very difficult" and that "pilots tend to exaggerate how close airplanes are". Respondent's Post-Hearing Brief at 12. Respondent also relies on the testimony of Mr. Eckhart, a pilot with experience in the T-33 and other war bird aircraft. Mr. Eckhart stated that the "factual inconsistencies" between Dr. Maxwell's account of the incident and Dr. Gill's account of the incident lead Mr. Eckhart to believe the accounts are not credible.

Finally, Respondent strongly reiterates his argument that the Administrator's case is flawed because the Administrator did not "follow her own regulations or policies" despite being so bound by law, citing Steenholdt v. FAA, 314 F.3d. 633 (D.C. Cir. 2003). Respondent's Post-Hearing Brief at 15. Citing Green v. Brantley, 719 F.Supp. 1570 (N.D. Ga. 1989), Respondent argues that because an airman's certificate is a protected property or liberty interest, Respondent should not be sanctioned or his airman's certificate suspended where "none of the procedural safeguards were followed, neither by the complaining witness nor by the FAA." Respondent's Post-Hearing Brief at 18.

DISCUSSION

Throughout the course of this matter, Respondent has repeatedly argued that the foundation of the Administrator's case is suspect, and fatally flawed, because of the delay between the alleged incident and Dr. Maxwell's first report to the FAA. As already stated, the undersigned is not persuaded by this argument. The Administrator has shown that Dr. Maxwell reasonably believed he was following proper procedure by reporting the incident to Connie Bowlin, a representative of the EAA. It is undisputed that when Dr. Maxwell was advised by the EAA to report the incident to the FAA, Dr. Maxwell did so without delay. Moreover, Respondent's persistent reliance on §7-6-3 of the Airman Information Manual is misplaced because the AIM merely offers guidance to pilots as to proper FAA incident reporting protocol. The AIM placed no *duty* on Dr. Maxwell to report the incident in a specific time or fashion. Because Dr. Maxwell was not under any legal duty to report the incident *at all*, the delay is not an issue for the court's consideration.

As to the issues of Inspector McKinney's "incomplete" report and the "missing" radar, weather, and communication data, the undersigned is satisfied that the neither the relative degree of the report's completeness nor the "missing" data are prejudicial to Respondent. In her post-hearing brief, the Administrator correctly points out that prosecuting a regulatory violation is not prohibited where the relevant near midair collision report was not completed. Administrator's Post-Hearing Brief at 4. Moreover, the Administrator has offered a satisfactory explanation as to the unavailability of the data Respondent seeks. Administrator's Post-Hearing Brief at 2. Even if the data were available to the parties, the undersigned is not convinced that it would have any bearing on the outcome of this matter as the essential facts of this case are not disputed, save for the issue of the distance between Respondent's T-33 and Dr. Maxwell's MU-2 during the incident at issue. The Parties here do not dispute the weather, time, or location of the incident, and even agree that respondent called out "Marius, is that you?" over the radio. Administrator's Post-Hearing Brief at 5, Respondent's Post-Hearing Brief at 2.

There is but on issue to be decided in this case, and that is whether on July 30, 2005 Respondent violated §91.111(a) of the Federal Aviation Regulations (14 C.F.R. 91.111(a)) by operating his aircraft in a manner creating a collision hazard, or whether

Respondent violated §91.13(a) of the Federal Aviation Regulations (14 C.F.R. 91.13(a)) by operating his aircraft in a careless manner that endangered the lives and property of others. Much effort has apparently been devoted to estimating the distance between the two aircraft during the incident at issue. Through the testimony of Respondent's witnesses, Respondent alleges Chris Rounds' T-33 could not have come closer than 1,000 feet to Dr. Maxwell's MU-2. Respondent's Post-Hearing Brief at 11. Two problems arise here. First, Respondent's witness Fran DeJoseph testified that (1) it is very difficult to determine the relative distance between two aircraft in space and (2) pilots tend to exaggerate how close airplanes are. Respondent's Post-Hearing Brief at 12. Accordingly, no more weight can be given to Respondent Chris Rounds' testimony regarding the distance between the aircraft than can be given to Dr. Maxwell.

Second, a measurable "distance between the aircraft" is not an element of the regulatory violations Respondent is charged with. Here again, Respondent has erroneously relied on the Airman Information Manual to persuade the court as to a definition of a near midair collision. Respondent's Post-Hearing Brief at 6. The issue does not turn on whether Respondent operated his aircraft "within 500 feet or less" of another aircraft, nor does the issue turn on whether a report of a close encounter by Dr. Maxwell was made immediately following the incident. Respondent's Post-Hearing Brief at 6. The fact that Dr. Maxwell did not immediately report a "close encounter" does not mean such an incident did not occur.

Notwithstanding Chris Rounds' testimony that his T-33 never came closer than 1,000 feet to Dr. Maxwell's MU-2, Respondent has not offered any other evidence or testimony to establish that he did not operate his aircraft in a careless manner or in a manner creating a collision hazard. The testimony of Mr. DeJoseph does not add anything to this case other than to establish that it would have indeed been difficult to determine the distance between the two aircraft during the incident at issue. While Mr. Bouchard testified that he was not aware of any other aircraft operating in close proximity to Respondent's T-33 during their flight, his unawareness does not establish that it did not happen. Assuming Respondent pulled up in front of Dr. Maxwell as described by the Administrator, the undersigned finds it highly unlikely that a first – time jet war bird passenger would be looking up and over his shoulder during a dramatic

climbing maneuver and notice another aircraft, especially considering both aircraft were each traveling in excess of 200 knots.

Finally, this case turns on the credibility of Dr. Maxwell and Respondent Mr. Rounds. The testimony of Dr. Maxwell is more credible given the circumstances of this case, and as supported by his passenger, Dr. Tim Gill. Respondent's testimony is entitled to less credibility, particularly in light of his history involving a similar incident.

ORDER

It is, therefore, ordered that safety in Air Commerce and Safety in air transportation requires an affirmation of the Administrator's Order of Suspension. A preponderance of the regulatory violations alleged by FAR 91.111(a) and FAR 91.13(a), and the sanction sought of a 120-day suspension of Respondent's Airline Transport Pilot Certificate is also affirmed.

And It Is SO ORDERED.

ENTERED this 9th day of July 2007 at ARLINGTON, TEXAS.

HON. WILLIAM R. MULLINS
ADMINISTRATIVE LAW JUDGE

APPEAL (WRITTEN INITIAL DECISION)

Any party to this proceeding may appeal this written initial decision by filing a written notice of appeal within 10 days after the date on which it was served (the service date appears on the first page of this decision). An original and 3 copies of the notice of appeal must be filed with the:

National Transportation Safety Board
Office of Administrative Law Judges
Room 4704
490 L'Enfant Plaza East, S.W.
Washington D.C. 20594
Telephone: (202) 314-6150 or (800) 854-8758

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this initial decision. An original and one copy of the brief must be filed directly with the:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594
Telephone: (202) 314-6080

The Board may dismiss appeals on its own motion, or the motion of another party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

A brief in reply to the appeal brief may be filed by any other party within 30 days after that party was served with the appeal brief. An original and one copy of the reply brief must be filed directly with the Office of General Counsel in Room 6401.

NOTE: Copies of the notice of appeal and briefs must also be served on all other parties to this proceeding.

An original and one copy of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel in Room 6401. Copies of such documents must also be served on the other parties.

The Board directs your attention to Rules 7, 43, 47, 48 and 49 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. §§ 821.7, 821.43, 821.47, 821.48 and 821.49) for further information regarding appeals.

ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.